IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISON

UNITED STATES OF AMERICA Plaintiff, v. CORROD PHILLIPS Defendant.	)))))))	Case Number: CR18-40097 **MOTION FOR A NEW TRIAL UNDER RULE 33**

NOW COMES, the Defendant, Corrod Phillips, through his attorneys, Manuel De Castro and Gal Pissetzky, and moves this Honorable Court pursuant to Rule 33 of the Federal Rules of Criminal Procedure to vacate the verdicts of guilty on Counts One and Two, and order a new trial on those counts. In support of this Motion, the Mr. Phillips states as follows:[1]

Legal Standard

Under Federal Rule of Criminal Procedure 33, this court may vacate any judgment and grant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33. The authority to grant a new trial is within the sound discretion of the district court. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). The district court is given broad discretion in that it may "weigh the evidence, disbelieve witnesses, and grant a new trial where there is substantial evidence to sustain the verdict." *United States v. Campos*, 306 F.3d 577, 579 (8th Cir. 2002). This court is not required to view the evidence in the light most favorable to the government, but rather must independently consider the evidence presented. *United States v. Brown*, 956 F.2d 782, 786 (8th Cir. 1992). As detailed further below, the lack of evidence presented by the government and various errors made by this Court entitle Mr. Phillips to a new trial.

[1] Mr. Phillips is filing the instant motion without the benefit of trial transcripts. Therefore, Mr. Phillips incorporates by reference all objections made during the trial as though fully recited herein. In addition, he hereby incorporates all pre-trial and trial motions denied by this Court.

Analysis

I. The Court Erred When It Denied Mr. Phillips' Motion For A Mistrial During Voir Dire Because There Were No African Americans In The Venire.

After the entire Venire was seated in Court for Voir Dire, Mr. Phillips objected that there were no African-American prospective jurors in the Venire. Mr. Phillips and Mr. Cathey are African-American. The Venire consisted of Caucasian Americans.

In cases involving the venire, our Supreme Court "has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing the opportunity for discrimination. *Batson v. Kentucky*, 476 U.S. 69, 95 (1986)(citing *Whitus v. Georgia, supra,* 385 U.S., at 552, 87 S.Ct., at 647; see *Castaneda v. Partida, supra,*430 U.S., at 494, 97 S.Ct., at 1280; *Washington v. Davis, supra,* 426 U.S., at 241, 96 S.Ct., at 2048; *Alexander v. Louisiana, supra,* 405 U.S., at 629-631, 92 S.Ct., at 1224-26.)(internal quotations excluded). "This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse." *Id.*

Here, Mr. Phillips timely raised the objection that his race, African-American, was substantially underrepresented and totally absent on the venire. The Court explained that the venire was comprised of registered voters in the district. Such a practice clearly provides the opportunity for discrimination. As such, Mr. Phillips made a prima facie showing of discrimination and was denied his equal protection rights, and his motion for a mistrial should have been granted. Thus, this Court should grant Mr. Phillips a new trial.

II. The Court Erred When It denied Mr. Phillips' Motion For A Mistrial After the Government Revealed That It Interviewed A Witness and Provided Her With Immunity While She was Still On The Witness Stand.

On Friday, November 15, 2019, the government called Nicole Hollaar as a witness. When the trial broke for the weekend, Ms. Hollaar was still testifying for the government under direct examination. On Sunday, November 17, 2019, Mr. Phillips' attorneys were notified by the government that the case agent and AUSA met with Ms. Hollaar, spoke to her directly about her testimony she provided on Friday, and provided her with use immunity once she took the stand again. On Monday, when the trial resumed, Mr. Phillips made a motion to bar Ms. Hollaar's testimony, strike her testimony, and for a mistrial. The Court denied Mr. Phillips' motion, but ordered the government not to question Ms. Hollaar about issues discussed during her Sunday meeting with the government. The Court did allow testimony relating to the granting of immunity and contents of her cell phone. The Court erred when it did not bar and strike her testimony altogether, or declared a mistrial.

The government violated this Court's sequestration order and Due Process rights. "Permitting a witness, including a criminal defendant, to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess." *Perry v. Leeke*, 488 U.S. 272, 282 (1989) A trial judge has the power to and must maintain the status-quo during a trial recess. *Id*. The court put in place a sequestration order specifically to prevent the prejudice described in *Perry*.

In *USA v. Calderin-Rodriguez*, 244 F.3d 977 (8th Cir. 2001), the Court held that the trial court did not commit error when it allowed the testimony of Lahiff to be heard, despite his meeting with the case agent during a break. Here, unlike in *Calderin-Rodriguez,* the government

purposely and knowingly defied the Court's order and met with a material witnesses to discuss her previous day's testimony, provide her with immunity, and thus influence her future testimony. Unlike in *Calderin-Rodriguez*, the government did not refresh Ms. Hollaar's memory with prior statements she made to officers. Moreover, Ms. Hollaar's testimony was material to all issues at trial, and prior to the government speaking to her on Sunday she did not mention or identify Mr. Phillips. This Court abused its discretion when it allowed her testimony after the government's violation of the sequestration order. This Court should grant a new trial due this blatant violation by the government.

III. The Court Erred When It Denied Mr. Phillips' Motion For A Mistrial After The Government Revealed It Granted Immunity To A Witness While He was Testifying.

On the morning of Candace Tchetter's testimony, the government met with Ms. Tchetter and her attorney to discuss her testimony. In addition, the government provided Ms. Tchetter with use immunity. The government, however, purposely failed to inform Mr. Phillips or the Court about the immunity deal, until Ms. Tschetter took the stand and began her testimony. Despite being cautioned by the Court after the Hollaar immunity deal, the government continued to meet with witnesses and strike immunity deals with them behind the Court's and Mr. Phillips' backs. Moreover, the government then failed to timely inform Mr. Phillips of the conversations and deals it stuck.

The government had a continuing obligation under this Court's standing discovery order to inform Mr. Phillips of any evidence that falls under Rules 16.1, 3500 material, *Brady*, *Giglio*, and *Jenks*. The government deliberately and purposely failed to abide by the Order. The Court should have sustained Mr. Phillips' objection to Ms. Tchetter's testimony because

it violated this Court's Order and was done immediately after the Hollaar violation. Thus, this Court should grant Mr. Phillips a new trial.

IV. The Court Erred When it Did Not Sustain Mr. Phillips' Objection to the Government's Misstatement of the Law And Improper Argument Relating to The Definition of Serious Bodily Harm and Application of The Causation Element.

The jurors in Mr. Phillips' trial were provided with 16 different jury instructions. In question are Final Instruction No. 7 and 8 with regard to serious bodily injury, and No. 9 with regard to the definition of "but for" cause. Based on the above instructions, the government improperly interpreted and misconstrued the law and definition of serious bodily harm and its application of "but for" causation.

In both Final Instructions No. 7 and 8, the jurors were given the following instruction: "And three, that Ty Olson [and Devlin Tommeraasen] would not have suffered serious bodily injury but for the use of the same heroin transferred by [Cathey] or Phillips." *See Final Instruction to the Jury* Pg. 14, 16. In order to explain "but for" cause, Final Instruction No. 9 was given, which stated as follows:

> The Prosecution must prove that serious bodily injury or death resulted from the unlawfully transferred controlled substance, not merely from a combination of factors to which the drug use contributed. This is known as a "but for" causation. For example, where A shoots B, who is hit and dies, we can say that A caused B's death, because but for A's conduct, B would not have died. The same thing is true if a person's act combines with other factors to produce the result, so long as the other factors alone would not have produced the result – the straw that broke the camel's back so to speak. Thus, if poison is administered to a man debilitated by multiple diseases, the poison is a "but for" cause of death even if the diseases played a part in his deterioration, so long as without the effect of poison he would have lived."

See Final Instructions to the Jury Pg. 18. In order to find serious bodily injury, the jurors were given the following instruction: "the prosecution must prove that serious bodily injury resulted

from the unlawfully transferred heroin, not merely from the combination of factors to which the drugs merely contributed." *Id*. at 13.

The Eighth Circuit reversed a conviction based on the government's failure to prove but-for causation. *United States v*. *Ford*, 750 F.3d 952 (8th Cir. 2014). In *Ford*, the defendant, Ford, was convicted, under Count One, of knowingly and intentionally distributing a mixture of heroin to Joseph Scolaro which resulted in his death within 1,000 feet of a school. Ford petitioned for a write of cert in light of *Burrage*, stating that the drug distributed by Ford was not an independently sufficient cause of the victim's death. The petition was granted, the judgement vacated and remand. The Eighth Circuit then reversed Count One declining to accept the government's broad and permissive interpretation that the "'use of a drug distributed by the defendant need not be a but-for cause of death, nor even independently sufficient to cause death, so long as it contributes to an aggregate force (such as mixed-drug intoxication) that is itself a but-for cause of death.'" *Id*. at 955. In other words, the court held that the government failed to prove the heroin was a "but for" cause of the victim's death, and, instead, only proved that the victim died "as a result of the ingestion of multiple narcotics, including the heroin distributed to him by Ford." *Id*.

As the government mistakenly argued in *Ford*, also here, during its closing argument, the government asserted that since both Olson and Tommeraasen recovered from the administration of Naloxone, which reverses the effects of heroin, it could be concluded that both victims' overdose was the "but for" cause of the heroin. This argument is similar to the flawed argument the government made in *Ford* and *Burrage*.

Taken literally, the government's "contributing cause" test, which was rejected in Burrage, "would treat as a cause-in-fact every act or omission that makes a positive incremental

contribution, however small, to a particular result. *Burrage,* 571 U.S. at 217. In other words, the government's argument essentially created a strict-liability crime, since every time Naloxone works the only cause for the overdose must be the heroin. This particular argument was repeatedly rejected.

None of the witnesses at trial, including Dr. Snell, could have concluded that Olson or Tommeraasen would have overdosed had they only used heroin. Dr. Snell agreed that he did not know the levels of drugs in either Olson or Tommeraasen. No witnesses was able to tell whether Olson would have overdosed had he not had Benzodiazepine in his system, and no witness was able to tell whether Tommeraasen would not have overdosed had he not had methamphetamines in his system. "Uncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend." *Id*. at 218.

Moreover, the government's explanation of "the straw that broke the camel's back" example misstated the but-for causality requirement because it argued that the heroin was the "cause-in-fact" since it was the "'substantial' or 'contributing' factor in producing" the overdose. *Id*. at 215 This is another argument that the *Burrage* Court rejected. The government asserted that since Olson and Tommeraasen woke up after being administered Naloxone, the heroin was the cause-in fact of the overdose. The heroin, in the government argued, was the substantial factor in producing the overdose. The Supreme Court rejected such an argument, and this court must too - reversal of the effects of the heroin during an overdose by the administration of Naloxone is not proof beyond a reasonable doubt that the person would have overdosed had he only used the heroin.

Thus, the Court must grant Mr. Phillips a new trial because the government improperly interpreted and misconstrued the law and definition of serious bodily harm and its application of "but for" causation with regard to Final Instruction No. 7, 8, and 9.

V. The Court Erred When It Instructed The Jury With Final Instruction No. 9 – "But For" Cause.

Over Mr. Phillips' objection, the Court included a definition of "but-for" cause under Final Instruction No. 9. The court erred when it denied Mr. Phillips' objection because the instruction did not accurately define the "but-for" causation as it related to this case. When Mr. Phillips explained his objection to the court, the Court rejected Mr. Phillips' objection asserting that it almost mirrors the example given to the but-for causation in *Burrage v. USA*, 571 U.S. 204 (2014). The Court erred when it made this conclusion.

In *Burrage*, the Court reviewed the question, "Whether the defendant may be convicted under the '*death results'* provision [ ] when the use of the controlled substance was a 'contributing cause' of the *death* . . .." *Id*. at 208 (emphasis added). Burrage was charged with distributing heroin to Joshua Banka, who died after using the heroin he bought from Burrage. *Id*. at 206. Aside from heroin, a toxicology report showed that "present in Banka *system"* were Oxycodone and Benzodiazepines. *Id*. Two medical experts testified in the case and said that they could not say "whether Banka would have lived had he not taken the heroin." *Id*. It was also established that the heroin was the only drug present in Banka's body that was above the therapeutic level range. *Id*.

The District Court denied Banka's motion for acquittal and the Eighth Circuit affirmed. The Supreme Court reversed and held that the statute's "results from" element requires a "but-for"

analysis as it relates to the caused death and serious bodily harm. When the Court analyzed the issue, it provided a number of examples to demonstrate what it meant by a "but for" causation. One of the examples it provided - which was this court's Final Instruction No. 9 - discussed two events when the end result of each was the death of a person. *Id*. at 211. But this was not a one-size fits all example.

The next example the Court gave demonstrated an example that did not result in death:

> "This but-for requirement is part of the common understanding of cause. Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter. It is beside the point that the victory also resulted from a host of other necessary causes, such as skillful pitching, the coach's decision to put the leadoff batter in the lineup, and the league's decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter's early, non-dispositive home run."

Id. at 211-212. This example, which is also as confusing as the previous example and that the Supreme Court also provided, is much more fitting to Mr. Phillips' case. It does not describe events that resulted in death, and it would have provided the jury with a more relevant explanation of the "but-for" causation. Jury instructions are given to juries to explain and define the law that they must follow. Jury instruction should not include instructions that simply provide examples and not definitions for legal terms. Although Final Instruction No. 9 provided the same definition of but-for causation under Final Instruction No. 7 and No. 8., it also provided the jury with an example that this not address the issues relating to Final Instructions 7 and 8. Thus, this court erred when it gave Final Instruction No. 9.

VI. This Court Should Set Aside Mr. Phillips' Guilty Verdicts and Grant Him a New Trial Because the Government Failed to Prove his Guilty Beyond a Reasonable Doubt

Under Rule 33, a district court may vacate a judgment and grant a new trial if the interest of justice so requires. Fed.R.Crim.P. 33(a). "The decision to grant or deny a motion for a new trial based upon the weight of the evidence is within the sound discretion of the trial court." *USA v. Campos*, 306 F.3d 577,579 (8th Cir. 2002) "While the district court's discretion is quite broad - it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict - there are limits to it." *Id*. (quoting *White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992) "Unless the district court ultimately determines that a miscarriage of justice will occur, the jury's verdict must be allowed to stand." *Id*. (*See USA v. Lacy*, 219 F.3d 779, 784 (8th Cir. 2000)) Unlike a Rule 29 motion, under Rule 33, this "court need not view the evidence in the light most favorable to the government, but may instead weigh the evidence and evaluate for itself the credibility of the witnesses." *Lacy*, 219 F.3d at 784 (8th Cir. 2000) Here, the jury's verdict is clearly contrary to the manifest weight of the evidence presented.

At trial, the government presented weak and uncorroborated evidence to prove its case, especially relating to Counts 5 and 6. First, as to Count 5, the government failed to present sufficient evidence to prove that the heroin Mr. Phillips allegedly sold to Shania Hofer ("Hofer") caused Ty Olson's overdose. The government present unreliable evidence that Hofer actually bought heroin from Mr. Phillips on April 23, 2018. The evidence at trial demonstrated that Hofer had *multiple* sources for heroin. It was also shown that Hofer traveled to Minneapolis and Chicago to buy heroin from different sources. Hofer testified that on April 23, 2018, she was high on heroin and during the time frame she bought the heroin for Ty Olson ("Olson"), she did

not remember many of the events. The government failed to prove that Mr. Phillips sold Hofer the heroin that she sold to Olson.

Moreover, even if the heroin Olson bought was sold by Mr. Phillips to Hofer, the evidence at trial established that Olson's toxicology report proved that in addition to heroin, Olson also had Benzodiazepine in his body when he overdosed. The government could not prove when Olson ingested the Benzodiazepine, that it was not in his blood, and that it did not contribute to his overdose. In fact, the evidence established, based on testimony from the EMT and vital sign reports, that Olson's overdose was caused by a combination of drugs, and the heroin was only a contributing factor to the overdose.

Dr. Snell, the government's expert, agreed that Benzodiazepine contributes and increases the probability for an overdose when heroin is also present. Although Dr. Snell claimed that he believed the heroin was the sole cause of the overdose, that opinion is unsupported by the evidence or science. As was established at trial, the only drug available on the field for emergency responders during an overdose is Naloxone. As such, whenever an overdose involves heroin in any combination with other drugs, Naloxone will reverse the effects of the heroin in the body. That is not proof that the heroin was the cause of the overdose, let alone the sole cause.

As the testimony established, all experts and EMT witnesses agreed that if there was a different antidote drug, similar to Naloxone, that treated overdoses that involved Benzodiazepines or Methamphetamines, the same reversal would have occurred because that antidote drug would have treated the Benzodiazepine or Methamphetamine effects. Under Dr. Snell's logic, if Olson was given a Benzodiazepine antidote drug, he would have concluded that Olson's overdose was caused by the Benzodiazepine and not heroin. It's flawed logic, and this Court, nor any trier of fact should follow it blindly.

This Court must look at the evidence, and not Dr. Snell's unsupported conclusion. Simply because Olson woke up after the administration of Naloxone, does not mean that his overdose was not cause by a combination of drugs that included heroin as a contributor. Dr. Snell testified that taking a non-toxic amount of heroin might not cause an overdose; and taking a non-toxic amount of Benzodiazepine might not cause an overdose; but taking both non-toxic amount of heroin along with a non-toxic amount of Benzodiazepine has a much higher probability to cause an overdose. During an overdose that was cause from combining non-toxic amount of heroin with non-toxic amount of Benzodiazepine, Naloxone would still reverse the heroin effect in the body. That, however, does not mean that the heroin *caused* the overdose –the element the government is required to prove beyond a reasonable doubt.

Importantly, the government's evidence showed that Olson only used a small amount of heroin and that he was a regular heroin user. As such, he had tolerance for heroin and a small amount of heroin would not have caused him to overdose, unless it was supplemented with another drug, i.e. Benzodiazepine. Thus, the overdose was caused by a combination of drugs and the heroin was simply a contributor. The Benzodiazepine in combination with the heroin undeniably caused Olson's serious bodily harm. The administration of Naloxone revived Olson only because it reversed the effects of the heroin in Olson's body. Benzodiazepine has the same affects on one's respiratory and cardiovascular systems as heroin. When Olson received the Naloxone, his suppressed respiratory system became less suppressed because of the antidote drug. At that time, because the combined effect that caused the overdose was stopped, Olson recovered. Olson did not recover because the heroin caused the overdose, he recovered because the heroin, one of the two equal causes, was removed, thereby eliminating the deadly combination. The government never presented evidenced that the Benzodiazepine would have

caused the overdose alone or that the heroin would have caused the overdose alone. The government did not prove that the heroin was "the straw that broke the camel's back," because the evidence did not, and could not, establish that element. The evidence only proved that Olson took a combination of drugs and that combination caused his overdose. This Court must accordingly grant Mr. Phillips a new trial because the government failed to meet its burden of proof.

Next, as to Count 6, the government failed to present sufficient evidence to prove that Mr. Phillips sold heroin to Devlin Tommeraasen on May 16, 2018. The government present unreliable evidence that Tommeraasen actually bought heroin from Mr. Phillips on May 16, 2018. The evidence at trial demonstrated that Tommeraasen had *multiple* sources for heroin. At trial, it was proven that Tommeraasen was a liar that agreed to testify for the government because he wanted the government to file a Rule 35 motion on his behalf. Despite disagreeing that he caused Ms. Groth's deathe, Tommeraasen knew that pleading guilty to Ms. Groth's death and testifying for the government was what he needed to do in order to receive a very favorable and low sentence. He also testified that he was high on methamphetamine when he went to buy heroin with George Clark. Clark, however, did not see who Tommeraasen bought heroin from. In fact, only Tommeraasen testified that the heroin he purchased on May 16, 2018, came from Mr. Phillips. Yet, Tommeraasen's story was a "truth discrepancy", and the government did not prove beyond a reasonable doubt that Tommeraasen purchased heroin from Mr. Phillips that day.

Moreover, even if the heroin Tommeraasen bought was sold by Mr. Phillips, the evidence at trial established that in addition to heroin, Tommeraasen also had methamphetamine in his body when he overdosed. He admitted that at the very least he used methamphetamine late on the night of May 15, 2018. The evidence, however, proved that he used methamphetamine on

May 16, 2018 as well. Clark testified that when he saw Tommeraasen on May 16, he was high on methamphetamine. Police reports indicated that he has multiple injection marks on his arm, which indicated multiple drug use. The vital signs showed that his blood pressure and pulse were high, an indication that Tommeraasen recently used uppers – drugs, such as methamphetamine, that cause hypertension. All these symptoms along with Clark's and officer's observations prove that Tommeraasen used methamphetamine shortly before his overdose, or at the very least that he had methamphetamine in his system when he overdosed. Thus, Tommeraasen's overdose was caused by a combination of drugs, and the heroin was only a contributing factor to the overdose.

Dr. Snell, the government's expert, agreed that methamphetamine contributes and increases the probability for an overdose when heroin is also present. Moreover, Dr. Snell could not conclude that the heroin was the sole cause of the overdose. He only opined that because the Naloxone reversed the heroin effects, Tommeraasen must have overdosed due to the heroin. As was established at trial, however, the only drug available on the field for emergency responders during an overdose is Naloxone. As such, whenever an overdose involves heroin in any combination with other drugs, Naloxone will reverse the effects of the heroin in the body. That is not proof that the heroin was the cause of the overdose, let alone the sole cause.

As the testimony established, all experts and EMT witnesses agreed that if there was a different antidote drug, similar to Naloxone, that treated overdoses that involved Benzodiazepines or Methamphetamines, the same reversal would have occurred because that antidote drug would have treated the Benzodiazepine or Methamphetamine effects. Under Dr. Snell's logic, if Tommerassen was given a methamphetamine antidote drug, he would have concluded that Tommerassen's overdose was caused by the methamphetamine and not heroin. It's flawed logic, and this Court, nor any trier of fact should follow it blindly.

This Court must look at the evidence, and not Dr. Snell's unsupported conclusion. Simply because Tommeraasen woke up after the administration of Naloxone, does not mean that his overdose was not cause by a combination of drugs that included heroin as a contributor. Dr. Snell testified that taking a non-toxic amount of heroin might not cause an overdose; and taking a non-toxic amount of methamphetamine might not cause an overdose; but taking both non-toxic amount of heroin along with a non-toxic amount of methamphetamine has a much higher probability to cause an overdose. During an overdose that was cause from combining non-toxic amount of heroin with non-toxic amount of methamphetamine, Naloxone would still reverse the heroin effect in the body. That, however, does not mean that the heroin *caused* the overdose –the element the government is required to prove beyond a reasonable doubt.

Importantly, the government's evidence showed that Tommeraasen only used a small amount of heroin and that he was a regular heroin user. Tommeraasen testified that as soon as he started injecting the heroin into his body he nodded off. As such, he had tolerance for heroin and a small amount of heroin would not have caused him to overdose, unless it was supplemented with another drug, i.e. methamphetamine. Thus, the overdose was caused by a combination of drugs and the heroin was simply a contributor.

The methamphetamine in combination with the heroin undeniably caused Tommeraasen's serious bodily harm. The administration of Naloxone revived him only because it reversed the effects of the heroin in his body. Methamphetamine, as an upper drug, causes high blood pressure and high pulse. When Tommeraasen received the Naloxone, his suppressed respiratory system became less suppressed because of the antidote drug. At that time, because the combined effect that caused the overdose was stopped, Tommeraasen recovered. Yet, he did not

fully recover, since the methamphetamine was still causing him to suffered from an extreme high blood-pressure for a long period of time.

Tommeraasen did not recover because the heroin caused the overdose, he recovered because the heroin, one of the two equal causes of the overdose, was removed, thereby eliminating the deadly combination. The government never presented evidenced that the methamphetamine would have caused the overdose alone or that the heroin would have caused the overdose alone. The government did not prove that the heroin was "the straw that broke the camel's back," because the evidence did not, and could not, establish that element. The evidence only proved that Tommeraasen took a combination of drugs and that combination caused his overdose. This court must accordingly grant Mr. Phillips a new trial because the government failed to meet its burden of proof.

Conclusion

When taken in their totality, the above-mentioned errors undoubtedly prejudiced Mr. Phillips and precluded him from receiving a fair trial. In the interests of justice, Mr. Phillips moves this Honorable Court to exercise its inherent power and grant him a new trial.

WHEREFORE, Mr. Phillips respectfully requests that this Honorable Court enter an Order granting Mr. Phillips a new trial.

Respectfully submitted,

/s/ Manuel J. de Castro, Jr.
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CERTIFICATE OF SERVICE

The undersigned, Gal Pissetzky, hereby certifies that in accordance with Fed.R.Crim.P. 49, Fed.R.Civ.P. 5, and the General Order on Electronic Case Filing (ECF), the

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was served, on December 2, 2019, pursuant to the district court's ECF filers to the following:

Respectfully submitted,

/s/ Manuel J. de Castro, Jr.
Manuel J. de Castro, Jr.